No. 80-5302

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

WILLIAM HOWELL,

Appellant,

v.

COSHOCTON COUNTY CHILDREN'S SERVICES BOARD,

Appellee.

Statement in Support of Jurisdiction

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

WILLIAM HOWELL,

Appellant,

v.

COSHOCTON COUNTY CHILDREN'S SERVICES BOARD,

Appellee.

Statement in Support of Jurisdiction

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require that the State of Ohio intrude upon the parent-child relationship only when the intrusion rationally furthers a compelling state interest?

2. If so, is a statute overly broad which allows the state to intervene when the environment of the child is such that state intervention is warranted "in the interests of the child", in that said statute permits intervention when the state has no compelling interest in regulating that situation?

3. Does the Fourteenth Amendment mandate that the State of Ohio base the termination of the parent-child relationship upon an ascertainable standard?

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OPINIONS BELOW

The opinion of Ohio's Fifth District Court of Appeals was not reported, but a copy of that opinion has been reproduced, and attached as Appendix B . The Ohio Supreme Court denied the Appellant's Motion to Certify the Record without opinion.

GROUNDS FOR JURISDICTION

This is an appeal of an order, dated August 9, 1980, terminating the parental rights of the Appellant William Howell to his daughter Mary Evelyn Howell.

This is a direct appeal of a judgment of the Ohio Supreme Court which was entered on May 29, 1980, which dismissed the Appellant's appeal and denied his Motion to Certify the Record. A timely Notice of Appeal was filed in the Ohio Supreme Court on August 22, 1980.

This Court has jurisdiction to review the judgment on appeal pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV

> "No person shall. . .be deprived of life, liberty, or property without due process of law;. . ."

Statute

Ohio Revised Code §2151.04(C). Dependent child defined.

> As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

* * *

(C) Whose condition or environment is such as to warrant the state, of the child, in assuming his guardianship.

STATEMENT OF THE CASE

Initially, the Appellee Coshocton County Children's Services Board filed a Complaint in the Court of Common Pleas, Juvenile Division, Coshocton County, Ohio on March 5, 1976. In that Complaint Mary Evelyn Howell, born September 23, 1971, was alleged to be a dependent child, and Appellee Children's Services Board prayed for temporary custody.

In February of 1976, Mary Evelyn's mother had been shot and killed by Appellant William Howell, and in June of that same year, Appellant William Howell pleaded guilty to voluntary manslaughter, and was sentenced to serve seven to twenty five years in a penal institution in the State of Ohio. Pursuant to the request of Appellee Children's Services Board, temporary custody of Mary Evelyn was granted, pending a hearing on the Complaint.

On May 5, 1978, an adjudicatory hearing was held, resulting in a May 24, 1978 Judgment Entry granting permanent custody of Mary Evelyn Howell to Appellee Children's Services Board. An appeal was taken to the Court of Appeals for Coshocton County, Ohio and on March 19, 1979, the Fifth District Court of Appeals for Coshocton County, Ohio reversed and remanded the case to the Juvenile Court of Coshocton County, Ohio.

On April 23, 1979, Appellee Children's Services Board filed a new Complaint with the Court of Common Pleas, Juvenile Division, Coshocton County, Ohio, alleging that Mary Evelyn Howell was a dependent child, and praying for permanent custody.

On June 13, 1979, the Appellant filed a Motion to Strike Count Two of the Complaint. Count Two of the Complaint had as its basis §2151.04(C) of the Ohio Revised Code. The Appellant contended that the statute was overly broad and impermissably vague, and that accordingly, the statute should be declared unconstitutional. This Motion was overruled on July 5, 1979 by a judgment entry of the same date. This motion was renewed at the adjudicatory hearing on August 2, 1979, and it was again overruled. At the adjudicatory hearing, the court found Mary Evelyn Howell to be a dependent child as defined in §2151.04 of the Ohio Revised Code. On August 9, 1979, the Court journalized it's findings and orders of August 2, 1979, thereby awarding permanent custody of Mary Evelyn Howell to the Appellee Children's Services Board.

A timely appeal was taken to the Fifth District Court of Appeals, assigning several errors. One of the errors thus assigned was that the Juvenile Court erred in overruling Appellant's Motion to Strike Count Two. The Fifth District Court of Appeals affirmed the order of the Juvenile Court, in a judgment entry dated January 31, 1980.

A Notice of Appeal to the Supreme Court of Ohio was filed on February 26, 1980 with the Fifth District Court of Appeals. On May 29, 1980, the Supreme Court of Ohio dismissed Appellant's appeal to that court, and denied the Appellant's Motion to Certify the Record. This case is presently before this Court on the same issues that were raised in the trial court by Appellant's motion to strike, and which were subsequently argued in each succeeding court.

REASONS FOR PLENARY CONSIDERATION

I.

This Court has consistently stated that state interference with family relationships may trench on protected "liberty" interests of the family members, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The relevant inquiry is to determine the relative importance of this "liberty" interest, and to identify the degree of protection afforded it. Basically, resolution of this issue requires a choice between one of two modes of analysis. This Court must decide whether the family, as an institution, is to be afforded the more traditional, less exacting analysis found in *Whalen v. Roe*, 429 U.S. 589, 596-98 (1977) (which would uphold a state intrusion, if it is reasonably related to a permissible state purpose); or whether it is to be afforded greater protection by imposing the analysis found in *Roe v. Wade*, 410 U.S. 113, 155 (1973), which would allow the state to intrude upon the family relationship only if the intrusion rationally furthers a compelling state interest. The Appellant respectfully submits that the latter analysis should be imposed.

This Court has recently stated that:

> the right to conceive and to raise one's children have been deemed essential...basic civil rights of man (citation omitted).... [T]he interest of a parent in the companionship, care, custody and management of his or her child comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements (citation omitted). *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

In *Stanley v. Illinois*, *supra*, this Court did not reach the issue presented here. Instead, the Court held that the distinctions made by the State of Illinois were not rationally related to the stated purpose of the distinction (protection of minor children). The *dicta* quoted above, however, would indicate that the family, as an institution, is to be accorded greater protection than is normally given a protected interest. Accordingly, if this language means anything, it must mean that the state must justify its measures by means of a test more exacting than the traditional rational means used to promote a permissible purpose.

The best method available for determining the significance of the *dicta* in *Stanley v. Illinois*, *supra* is to reason by analogy, and therefore, the significance of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny is undeniable. Specifically, this Court held in *Roe v. Wade* that a woman had a fundamental right to terminate her pregnancy, and that the state could not validly interfere with that right unless it had a compelling interest. *Id.* at 153-155. The analogy is clear. If a person is perceived to have a fundamental interest in deciding to bear a child, then that person certainly has a fundamental right to make the necessary decisions as to its care and upbringing. Accordingly, the state may interfere with the care and upbringing of a child only when it furthers a compelling interest by doing so. Nor is the term "compelling" merely superfluous language used for literary emphasis, rather "'[c]ompelling' is ... the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interest, and must be narrowly drawn to express only those interests." *Carey v. Population Services International*, 431 U.S. 678, 686 (1977).

Several lower courts have determined that the state may not intrude upon the parent child relationship if the intrusion does not further a compelling state interest. *E.g. Duchesne v. Sugarman*, 566 F. 2d. 817 (2nd Cir. 1977); *Davis v. Page*, 442 F. Supp. 258 (S.D. Fla., 1977); *Roe v. Conn*, 417 F. Supp. 709 (M.D. Ala. 1976); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd.*, 545 F. 2d 1137 (8th Cir. 1976). In fact, the Supreme Court of Ohio (the court whose order is being appealed) has recently held that the state must show a compelling interest if it is to validly interfere with the parent-child relationship. *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 399 N.E. 2d 66 (1980). In that case the Ohio Supreme Court said:

> [A]s seen in *Moore* [*v. City of East Cleveland*] *supra*, and *Stanley* [*v. Illinois*], *supra*, the right to personal choice in family matters, including the right to live as a family unit, is a fundamental due process right, *Id.*, at 13, 399 N.E. 2d, 70.

The significance of adopting the "compelling" interest analysis is great. If this analysis is adopted by this court, then parents who are faced with termination of their parental rights, a grievous personal loss, will be afforded many substantive and procedural safeguards not presently afforded ordinary civil litigants. These parents then could be given counsel if indigent, transcripts on appeal if indigent, and would be given greater protection from erroneous deprivations by requiring proof by clear and convincing evidence. All this could be done within an analytical framework which would leave ordinary civil litigants in the same position as they are now. This has been done in other areas of the law, *e.g. Addington v. Texas*, 60 L. Ed. 2d 323 (1979); *In re Gault*, 387 U.S. 1 (1967), where the litigant faces a serious deprivation of personal liberty.

Accordingly, the Appellant submits that his first question presents a substantial constitutional question which requires plenary consideration by this honorable Court.

II.

If this Court should find that the state may intrude into the family relationship only if such an intrusion furthers a compelling interest of the state, then the Appellant respectfully submits that the statutory provision in question here is facially invalid, since it allows the state to intrude upon the parent-child relationship in instances where the state has no compelling interest. Specifically, the statute in question, §2151.04 (C) of the Ohio Revised Code, allows the state to intrude upon the parent-child relationship when the child's "condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship." *Id.* (emphasis added).

The initial step in determining if this statute is overly broad is to identify the state interest which the statute is intended to further. Since there is no legislative history in Ohio, only the apparent interest may be identified. On its face, this statute seems to have been designed to protect the child by allowing the state to assume the guardianship of the child. Essentially, this statute allows the state to intrude upon the parent-child relationship if the child's condition or environment is such that it would be in the child's best interest for the state to assume custody. The defect in the statute is apparent. The statute, by allowing intervention when the child's present environment is not in its best interest, gives the juvenile judge the power to remove the child if he finds that the state, through foster care or adoption, can provide a better home for the child than can its parents. Conceivably, a

parent could lose the custody of his child for no better reason than his poverty, since the State of Ohio can most certainly provide better opportunities for the child by means of foster care placement, or adoption, than can a parent living at poverty levels. Essentially, this statute allows the state to intrude up the family relationship if it is in the best interests of the child. The validity of any "best interest" standard should be seriously questioned, as it was by Mr. Justice Stewart when he said:

> [i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in children's best interest, I should have little doubt that the State would have intruded impermissably on "the private realms of family life which the state cannot enter." (Citation omitted).

Smith v. Organization of Foster Families, 431 U.S. 816, 863, 864 (1977) (Stewart, J. concurring). In the instant case, there was no showing that the Appellant was inherently unfit. In fact, the trial court refused to order any type of psychological profile of the Appellant, in order to determine if he was unfit (Tr. 127). Also, the attorney for Appellee Children's Services Board, in opposing that motion, argued that the fitness of the Appellant was immaterial in the context of that proceeding, saying:

> I would point out to the Court the case of *In Re Cunningham*, [59 Ohio St. 2d 100, 391 N.E. 2d 1034 (1979)], which has been recently decided by the Ohio State Supreme Court wherein that Court held that the mere fact that a natural parent is fit, though it is certainly one factor that may enter into judicial consideration, does not automatically entitle the natural parent to custody of his child since the best interest and welfare of that child are of paramount importance. Parental interest may be subordinated to the child's interest in determining an appropriate disposition of any petition to terminate parental rights. (Tr. 128,129).

The Appellant submits that any intrusion upon the parent child relationship, which is not based on the probability of injury to the child, is facially invalid, since the state only has a compelling interest in protecting the child if failure to intervene would be likely to immediately result in mental or physical harm to the child. This view has been adopted by numerous courts in the past, *e.g. Roe v. Conn, supra; Alsager v. District Court, supra; In re B.G.*, 11 Cal. 3d, 679, 114 Cal. Reporter 444, 523 P.2d 244 (1974); *State v. McMaster*, 259 Ore. 291, 486 P.2d 567 (1971); *In re William L.*, 477 Pa. 332, 383 A.2d 1228 (1978). *Cf. O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Doremus v. Farrell*, 407 F. Supp. 509 (O. Neb. 1975), *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Lynch v. Baxter*, 386 F. Supp. 378 (M.D. Ala. 1974).(Commitment cases holding that substantive due process will not allow commitment absent a showing that a personis mentally ill and dangerous to himself or others). Significantly, imposition of an injury - oriented standard would not greatly increase the danger to the child, since temporary custody could be easily obtained merely be showing a probability of injury to the child. The imposition of this standard would, however, greatly narrow the scope of permissible intrusions, by eliminating the possiblity of a "best interests" type of adjudication. Furthermore, this result would be consistent with the result reached by this Court in *Quilloin v. Walcott*, 434 U.S. 246 (1978). In that case, this Court held that parental rights could be terminated upon a showing that termination was in the child's best interest, without showing that the parent was an unfit parent, where the father had never had actual or legal custody. *Id.* at 255. *Cf. Stanley v. Illinois, supra.* (emphasis added).

Accordingly, the Appellant respectfully requests that this Court grant a plenary hearing, for the reason that §2151.04(C) of the Ohio Revised Code is unconstitutional on its face because it allows intrusion into the parent-child relationship in situations where the state has no compelling reason for such an intrusion.

III.

This Court has consistently held that the state may not intrude upon a protected interest by means of a vaguely worded statute, e.g. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Palmer v. City of Euclid*, 402 U.S. 544 (1971). The Appellant submits that the State of Ohio has intruded upon the parent-child relationship in a similar manner in this case.

The Ohio dependency statute, §2151.04(C) of the Ohio Revised Code, is unconstitutionally vague in that it fails to sufficiently define what type of environmental conditions "warrant the state" in assuming custody of a child. This statute has been in effect since the early portion of the twentieth century, and has remained unchanged. The last time that the word environment, as used in the context of §2151.04(C), was construed was *In re Konneker*, 30 Ohio App. 502 (1929). In that case, the court noted the broadness of the term "environment" and held that a father could not be deprived of his children simply because he had been convicted of a felony. In discussing the term "environment", the court, quoting *Orr v. State*, 70 Ind. App 242, 123 N.E. 470, said:

> "Environment" is a word of broad significance. Just what the Legislature intended by this last clause we do not know. We assume, however, that it did

> not intend thereby to confer unlimited authority on the courts to determine arbitrarily and generally what sort of environment will justify the state in assuming control of infants. It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens. To determine and declare the general policy of the state on this subject is a legislative function which cannot be delegated to the courts. *In re Konneker*, 30 Ohio App. at 509.

Unfortunately for the parents of Ohio, the *dicta* in *In re Konneker, supra*, represents the last attempt of any Ohio Court to narrow the scope of §2151.04(C). Like most *dicta*, it has been left along the way, only to be resurrected in an occasional law review article for the purpose of emphasis.

In *Alsager v. District Court, supra*, the court, identified three defects of vague statutes:

> 1) The statute [Iowa] as interpreted by a man of average intelligence, must give notice as to what is prohibited, so that the parents may conform their conduct to the law.
>
> 2) The statute must not be an improper delegation of policy making power so as to allow selective or arbitrary enforcement (emphasis added).
>
> 3) The statute's vagueness should not give rise to uncertainty, which would have a chilling effect on the parents' conduct ... *Id.* at 17.

Of the enumerated defects, the second, in the Ohio context, is most clearly applicable. The Ohio statute allows the juvenile court to determine when the environment of a child warrants intervention. Accordingly, the juvenile judge is free to remove any child who lives in a submarginal home. This, of course, means that the poor parent and the handicapped parent are more likely to suffer from the coercive intervention of the state than is the middle or upper class parent. Furthermore, there is a significant

possibility of erratic adjudications existing within the previously defined sub-classes. For example, the judge could find the home to be sub-marginal, and yet choose not to interfere with the parent-child relationship due to the court's empathy for the parent. Conversely, the court could find the home to be marginally adequate, and yet remove the child due to what the court feels is an undesirable personality trait of the parent. The point of this argument has been stated thusly:

> ... the fact that some one may think that the children can be reared better by some one else is no justification for judicial interference, because, if this were the rule, there are thousands of children in this community, and in every other, whose parents upon this pretense would be deprived of their custody. As was well said by another.
>
> "The Juvenile Court Law certainly does not contemplate the taking of children from their parents and breaking up family ties merely because, in the estimation of probation officers and courts, the children can be better provided for and more wisely trained as wards of the state. Probably from mere considerations of healthful and hygienic living and systematic education and training this would be true in the cases of thousands of families of wealth and respectability. We think it is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child." (citation omitted.) *In re Konneker*, *supra*, at 510, 511.

The Appellant submits that §2151.04(C) is void for vagueness since its enforcement necessarily entails arbitrary and selective application.

The Appellant further contends that §2151.04(C) is unconstitutionally vague in that it fails to give notice as to what type of conduct is prohibited by the statute. *See Alsager v. District Court, supra*, at 17, 18. Courts addressing this "notice" requirement have split in their decisions in a consistent manner. State statutes which do not have a "built in" period between adjudication and disposition, during which period parents have the opportunity to modify their conduct according to specific orders of the trial court have been held to be unconstitutionally vague. (*See Alsager v. District Court, supra*, and *Roe v. Conn, supra.*) Those state statutes which give the parent an opportunity to modify his or her conduct to a court-ordered standard prior to disposition, have been upheld as constitutional.

It is interesting to note that the Iowa statute, struck down in *Alsager, supra*, as being both vague and a denial of substantive due process was subsequently upheld in both *In Interest of Hochmuth*, 251 N.W. 2d 484 (Iowa 1977) and *Crooks v. McNelly*, 262 N.W. 2d 786 (1978). In the latter two cases, the Iowa Supreme Court held that since the parents were given an opportunity to meet certain court-ordered standards, the statute was constitutional as applied. The parents in *Alsager, supra* (*see* note 12, p. 20) were not given this opportunity.

Therefore, the Appellant submits that §2151.04(C) of the Ohio Revised Code is too vague to be fairly applied, and accordingly, that this is a substantial constitutional question which requires plenary consideration by this honorable Court.

CONCLUSION

For the foregoing reasons, it is submitted that this honorable Court should give these questions plenary

consideration, by requiring that the issues be fully briefed, and that the case be set down for argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Statement in Support of Jurisdiction was served upon the Appellant Coshocton County Children's Services Board by mailing a copy to Attorney David Hostetler, Assistant Prosecuting Attorney, 410 1/2 Main Street, Coshocton, Ohio 43812 and upon the Guardian Ad Litem Attorney Norman S. Davitt, 528 1/2 Main Street, Coshocton, Ohio 43812 by United States Regular Mail this 26th day of August, 1980.

Edward Emmett O'Farrell
Attorney for Appellant

BARRETT & FITCHIER, PUBLISHERS

THE SUPREME COURT OF OHIO

RECEIVED JUN 6 - 1980

THE STATE OF OHIO,
City of Columbus.

19 80 *TERM*

To wit: May 29, 1980

In re Mary Evelyn Howell
Alleged Dependent Child,
William Howell,
Appellant.
vs.

No. 80-429

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for COSHOCTON *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... *Clerk*

..... *Deputy*

THE SUPREME COURT OF OHIO

RECEIVED JUN 2 - 1980

THE STATE OF OHIO,
City of Columbus.

In re Mary Evelyn Howell
Alleged Dependent Child,
William Howell,
Appellant.
vs.

19 80 *TERM*

To wit: May 29, 1980

No. 80-429

APPEAL FROM THE COURT OF APPEALS

for COSHOCTON *County*

This cause, here on appeal as of right from the Court of Appeals for COSHOCTON *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for COSHOCTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... *day of* ..... *19* .....

..... *Clerk*

..... *Deputy*

THE SUPREME COURT OF OHIO

In the Matter Of	:	
MARY EVELYN HOWELL	:	Case No. 80-429
Alleged Dependent Child	:	
William Howell, Appellant	:	

(AN APPEAL FROM THE COSHOCTON
COUNTY COURT OF APPEALS
FIFTH APPELLATE DISTRICT)

AFFIDAVIT IN FORMA PAUPERIS

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I. THE SUPREME COURT OF OHIO

In the Matter Of	:	
MARY EVELYN HOWELL	:	Case No. 80-429
Alleged Dependent Child	:	AFFIDAVIT IN FORMA PAUPERIS
William Howell, Appellant	:	

My name is Edward Emmett O'Farrell. I am the Attorney representing William Howell, Appellant. My client, the Appellant is incarcerated in the Columbus Correctional Facility, Columbus, Ohio. William Howell has no source of income other than Social Security Disability in the amount of $200.00 monthly. He is without means to pay the costs of the deposit necessary for the filing of the Memorandum in Support of Jurisidiction in the Supreme Court.

Should he be able to pay the costs of said deposit in the future he will do so.

Edward Emmett O'Farrell

SWORN to and subscribed before me this 31st day of January, 1980.

Notary Public
MARY LONG, Notary Public
State of Ohio
My Commission Expires Oct. 15, 1982

IN THE COURT OF APPEALS

FIFTH APPELLATE DISTRICT

COSHOCTON COUNTY, OHIO

In the Matter Of	:	
MARY EVELYN HOWELL	:	Case No. 79-CA-16
Alleged Dependent Child	:	
William Howell, Appellant	:	NOTICE OF APPEAL

Appellant William Howell, by and through his attorney, respectfully enters his Notice of Appeal from the January 31, 1980 Judgment Entry of the Court of Appeals for Coshocton County, Ohio, Fifth Appellate District to the Supreme Court of Ohio. This case involves a substantial constitutional question.

Respectfully submitted,

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Attorney for Appellant William Howell

FILED
FEB 26 11 20 AM '80
COSHOCTON COUNTY, OHIO

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was served upon the Coshocton County Children's Services Board by mailing a copy to their attorney Assistant Prosecuting Attorney, David Hostetler, Home Savings & Loan Bldg., 401 1/2 Main Street, Coshocton, Ohio 43812 and mailing a copy to Attorney Norman Davitt, Guardian Ad Litem for Mary Evelyn Howell at 528 1/2 Main Street, Coshocton, Ohio 43812 this 14th day of February, 1980.

Edward Emmett O'Farrell

Edward Emmett O'Farrell
Attorney for Appellant William Howell

FILED

JAN 31 10 ... '80

... J. ...
CLERK OF COURTS
COSHOCTON CO., OHIO

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
MARY EVELYN HOWELL, ALLEGED DEPENDENT CHILD,	:	JUDGMENT ENTRY
		CASE NO. 79-CA-16
WILLIAM HOWELL,	:	
APPELLANT	:	

For the reasons stated in the Memorandum-Opinion on file, all four assigned errors are overruled and the judgment of the Court of Common Pleas, Juvenile Division, of Coshocton County, Ohio, is affirmed.

Edward D. Evans

Norman J. Putman

Leland Rutherford

JUDGES.

RECEIVED FEB. 5
FILED
JAN 31 10 40 AM '80
NAD E. J. BUSKIRK
CLERK OF COURTS
COSHOCTON CO., OHIO

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:JUDGES:
	Hon. Norman J. Putman, P.J.
MARY EVELYN HOWELL,	Hon. Leland Rutherford, J.
ALLEGED DEPENDENT CHILD,	: Hon. David D. Dowd, Jr., J.
WILLIAM HOWELL,	: O P I N I O N
APPELLANT	: CAse No. 79-CA-16
	Decided: _____

APPEARANCES:

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New Philadelphia, Ohio

ATTORNEY FOR APPELLANT

DAVID HOSTETLER
Assistant Prosecuting Attorney
Home Savings & Loan Bldg.
401 1/2 Main Street
Coshocton, Ohio 43812

ATTORENY FOR APPELLEE

DOWD, J.

This is an appeal from the judgment of the Juvenile Court of Coshocton County finding Mary Howell to be a dependent child and awarding permanent custody to the Coshocton County Children's Service Board.

The appeal is prosecuted by Mary's father who is presently serving a prison sentence of 7 to 25 years by virtue of his plea of guilty to the crime of voluntary manslaughter in the shooting death of Mary's mother in 1976. The initial complaint was filed thereafter. A previous adjudication and disposition was set aside by this Court in Case #78-CA-9 because, "the transcript of proceedings failed to disclose that the parent was advised that if permanent custody should be granted he would be divested of all parental rights. ....."

Another complaint was filed on April 23, 1979 alleging Mary Evelyn Howell to be a dependent child. A proper summons was issued and service had upon the appellant-father. After the father's motion for a continuance from a hearing scheduled for July 5, 1979, was sustained

and the hearing re-scheduled for August 2, 1979, an evidentiary hearing proceeded on August 2, 1979, during which hearing the court first adjudicated the issue of the child's dependency and therefore resolved the issue of disposition with the results previously described. The proof offered in support of the allegation of dependency was overwhelming. In 1976, after her mother's death, Mary Evelyn Howell was described as an emotionally disturbed child, unable to cope with children of her own age or to relate to adults. From the testimony, it is apparent that the child was vividly aware of the fact that her father had killed her mother.

We now consider the four assignments of error seriatim.

I

"That Section 2151.04(C), Ohio Revised Code is vague and overly broad and as a consequence is violation of Appellant's rights of substantive due process of law quaranteed by the constitution of Ohio and the United States and the trial court's refusal to grant Appellant's June 13, 1979 Motion to Strike filed in the action below is reversible error."

R.C. 2151.04(C) provides:

> "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'dependent child' includes any child: ....(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."

We hold that R.C. 2151.04(C) must be read in pari materia with the related sections of Chapter 2151 and, in particular, with R.C. 2151.27 which provides, in pertinent part, as follows:

> ".....complaint may be upon information and belief, and in addition to the allegation that the child is...dependent...the complaint must allege the particular facts upon which the allegation of...dependency... is based."

R.C. 2151.27 is enforced by the Ohio Supreme Court's decision, *In Re Hunt, 26 Ohio St. 2d 378,* where the court stated in the first paragraph of its syllabus:

> "Complaint under Juvenile Rule 10 and R.C. 2151.27 alleging that a child is dependent must state the essential facts which bring the proceeding within the jurisdiction of the court."

Against such a background, we find the claim that R.C. 2151.04(C) is unconstitutional and overly broad is without merit. Appellant's reliance upon *Alsager v. District Court of Polk County, 406 F. Supp. 10,* is not well taken.

As indicated by appellee's brief, while the District Court in *Alsager* found the Iowa statute to be vague, the Court of Appeals in *Alsager v. District Court of Polk County, 545 F. 2d 1137,* chose not to affirm on the issue of vagueness. Rather, the Court of Appeals gave the Iowa court's, "an additional opportunity to give the statutory provisions a plainly desirable limiting instruction". From the decision it does not appear that Iowa has a statute similar to Ohio's Revised Code Section 2151.27 which requires a particular state of the facts where the condition of the pendency is alleged. As indicated by *In re Hockmuth, 251 NW 2d 484 (Iowa 1977),* a subsequent construction requiring that parents be specifically advised of the underlying facts in the complaint and given an opportunity to correct them, was utilized to salvage the constitutionality of the Iowa statute.

In sum, we conclude the first assignment of error is not well taken, and it is overruled.

II

"The trial court erred in finding dependency and permanently divesting Appellant of his parental rights because, at the time, of the adjudicatory hearing, there was suitable family able and willing to care for the child who is the subject of the dependency complaint. The availability of suitable relatives at the time of the adjudicatory hearing precludes the termination of parental rights and privileges as a matter of of law. A finding, then, that the child was 'homeless or destitute or without proper care or "support" as set forth in Section 2151.04(A), Ohio Revised Code, is unwarranted and unsupported by any credible evidence, and is reversible error."

The predicate for the second assignment of error is the claim that Blanch and Harrison Bache, the child's paternal grandparents, were, at the time of the hearing, ready, willing, and able to provide adequate care for Mary Evelyn, and, consequently, the court could not find properly that Mary Evelyn, at the time of the adjudicatory hearing, was "homeless or destitute or without proper care or support" and its order to the contrary, not based on any credible evidence or such homelessness or destitution is reversible error. Blanch Bache is the natural mother of Mary Evelyn Howell's father. Harrison Bache is the step-father of the appellant, and, thus, not related by blood to Mary Evelyn Howell. Blanch Bache is 65 years of age and has not cared

for children for 22 years. Harrison Bache, her husband, is 64 years of age. The record is devoid of evidence suggesting that the Baches, at their advanced age, are capable of providing adequate care for Mary Evelyn in view of the extensive testimony that she was at the time of the filing of the initial complaint in 1976, a severely emotionally disturbed child and who, according to the expert testimony offered, still needs the continuing care of a stable family life. Against such a background, the claim asserted in the second assignment of error has no foundation in fact. The second assignment of error is overruled.

III.

"The trial court erred in failing to continue the adjudicatory hearing in order that the Appellant could be present at said hearing and/or erred in refusing to move the adjudicatory hearing to the correctional facility wherein Appellant was incarcerated at the time of the adjudicatory hearing. The State of Ohio cannot permanently divest Appellant of the custody, care, control and affection of his child without his presence at the adjudicatory and dispositional hearings when the reason for his absence is his incarceration by the State in a penal institution."

As previously indicated, the original adjudicatory hearing scheduled for July 5, 1979, was continued on the appellant's motion until August 2, 1979. On the day scheduled for the hearing, counsel for the appellant appeared and asserted that he had been unsuccessful in his attempt to secure the presence of the appellant at the hearing. He asked for a continuance. The continuance was denied. However, the testimony offered by the appellant at the first adjudicatory hearing was presented and made a part of the record.

No attempt was made by counsel for the appellant to secure the assistance of the court with respect to the appearance of the appellant for the hearing. Rather, counsel for the appellant moved for a continuance, or, in the alternative, requested that the hearing be moved to the correctional facility where the appellant was incarcerated. The trial court overruled both motions. We find he did not error.

It is apparent that the appellant, through counsel, had ample time to invoke the appropriate procedure to insure his presence at the hearing, or, in the alternative, to request the assistance of the court in providing for such an appearance. Having failed to do that, the appellant cannot now be heard to complain about the fact that he was not present for the hearing.

In finding that the record does not support the claim that the state denied the appellant the right to be present at the hearing, we do not further address the claim prosecuted by the third assignment of error. It is overruled.

IV.

> "The trial court erred in refusing to grant Appellant's motion for a separate dispositional hearing as well as investigations of Appellant's mother's home and examinations, physical and mental, and social history of Appellant which are provided for by Rules 32 and 34, Ohio Rules of Juvenile Procedure."

The record reflects that a separate dispositional hearing was held following the adjudicatory hearing (R-114). Appellant did move the court to postpone the dispositional hearing in order that a social history of the appellant's mother and a physical and mental examination of the appellant pursuant to Rule 32 of the Juvenile Rules, might be obtained. The provisions in Ohio Juvenile Rule 32(A)(4) authorizing the ordering of a social history or a physical or mental examination

are discretionary with the court. In the case sub judice, we find no abuse of discretion. The court had already heard the testimony of Mrs. Bache concerning her home. Thereafter, Mr. Davit, Mary Evelyn Howell's guardian ad litem, was questioned with respect to Mrs. Bache's home. In addition, the court had the transcript of William Howell's prior testimony during which he conceded that he had been imprisoned in the past prior to the killing of Mary's mother, and had also been institutionalized in Cambridge State Hospital. Against such a background, as well as the overwhelming testimony describing the severe emotional disturbance of Mary Evelyn Howell, the court was justified in concluding that no further inquiries would be beneficial. However, as indicated in the recent decision of the Ohio Supreme Court in *In re Cunningham, 59 Ohio St. 2d 100*, the primary inquiry at the dispositional phase is the best interest and welfare of the child, not the rights of the parents or grandparents. The fourth assignment of error is without merit and is overruled.

Having overruled the four assignments of error, the judgment of the Juvenile Court of Coshocton County is affirmed.

Rutherford, J. and
Putman, P.J. concur.

JUDGES.

IN THE SUPREME COURT OF OHIO

In the Matter of	:	
MARY EVELYN HOWELL	:	
Alleged Dependent Child	:	Case No. 80-429
WILLIAM HOWELL,	:	
Appellant.	:	

(Appeal From The Court Of Appeals
5th Appellate District, Coshocton County, Ohio)

NOTICE OF APPEAL

FILED
AUG 22 1980
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

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Guardian Ad Litem for Mary Evelyn Howel

IN THE SUPREME COURT OF OHIO

In the Matter Of	:	
MARY EVELYN HOWELL	:	Case No. 80-429
Alleged Dependent Child	:	
WILLIAM HOWELL,	:	NOTICE OF APPEAL
Appellant.	:	

Now comes the Appellant William Howell, by and through his attorney, and respectfully enters his Notice of Appeal from the May 29, 1980 Judgment Entry of the Ohio Supreme Court, which dismissed the Appellant's Appeal therein, to the Supreme Court of the United States, pursuant to 28 U.S.C. §1257(2). The issues herein present substantial constitutional questions.

Respectfully submitted,

Edward Emmett O'Farrell
Attorney for Appellant
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Tel. (216) 364-7769

Thomas W. Hardin
Legal Intern

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served upon David Hostetler, Assistant Prosecuting Attorney, 401 1/2 Main Street, Coshocton, Ohio 43812, Norman Davitt, Guardian Ad Litem at 528 1/2 Main Street, Coshocton, Ohio 43812 and the Clerk, Coshocton County Court of Appeals, Fifth Appellate District, Courthouse, Coshocton, Ohio 43812 by mailing them copies of the same by U.S. Regular Mail this 20th day of August, 1980.

Edward Emmett O'Farrell
Attorney for Appellant

Thomas W. Hardin
Legal Intern

COSHOCTON COUNTY, OHIO

JUVENILE DIVISION

In the Matter Of	:	
MARY EVELYN HOWELL	:	Case No. 5957
Alleged, Neglected and Dependent Child	:	
	:	NOTICE OF APPEAL
WILLIAM HOWELL	:	
Respondent-Appellant		

Notice is hereby given that William Howell, Respondent, hereby appeals to the Court of Appeals, Coshocton County, Ohio Fifth Appellate District from the final Judgment of August 9, 1979 finding that Mary Evelyn Howell is a dependent child and granting permanent care and custody of Mary Evelyn Howell to the Coshocton County Children Services Board.

Respectfully submitted,

Edward Emmett O'Farrell

Edward Emmett O'Farrell
Attorney for Respondent-Appellant
SOUTHEASTERN OHIO LEGAL SERVICES
131 Fair Ave. N.E.
New Philadelphia, Ohio 44663
Tel. (216) 364-7769

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Request for Transcript was served on the State of Ohio by mailing a copy of the same to David Hostetler, Assistant Prosecuting Attorney, Coshocton County, Ohio and Norm Davitt, Esquire, Guardian Ad Litem for Mary Evelyn Howell this 23rd day of August, 1979.

Edward Emmett O'Farrell

Edward Emmett O'Farrell
Attorney for Respondent-Appellant

COPY

RECEIVED AUG 15 1979

IN THE COURT OF COMMON PLEAS, JUVENILE DIVISION

COSHOCTON COUNTY, OHIO

APPENDIX

In the Matter of: :

Mary Evelyn Howell, :

a dependent child. :

CASE NO. 5957

JUDGMENT ENTRY

. . . . . .

This cause came on for adjudicatory hearing on August 2, 1979, upon the complaint of the Coshocton County Children Services Board alleging dependency pursuant to Sections 2151.04 (A) and 2151.04 (C), R. C., and requesting that the permanent care and custody of Mary Evelyn Howell be granted to the Coshocton County Children Services Board.

The court finds that notice of the hearing has been duly served.

The court having heard the evidence, and being fully advised in the premises, finds that Mary Evelyn Howell is a dependent child as alleged in said complaint.

The court, having heard further evidence as to the matter of disposition and further considering the testimony presented at the adjudicatory hearing relevant to disposition, hereby finds that an award of permanent custody to the Coshocton County Children Services Board is in the best interest of Mary Evelyn Howell. Accordingly, the Coshocton County Children Services Board is hereby granted permanent care and custody of Mary Evelyn Howell.

Holland M. Gary

Holland M. Gary, Judge

APPROVED:

David L. Hostetler

L. Hostetler, Attorney for
cton County Children Services Board

FILED

AUG 9 '79

In the Court of Common Pleas, Juvenile Court Division Coshocton County, Ohio

COMPLAINT

(CHILD OR CHILDREN) Case No. 5957

Revised Code, Sec. 2151.27

Docket 125 Page 183

In the Matter of
MARY EVELYN HOWELL
c/o Children Services Board
Coshocton, Ohio
alleged (1) dependent *child*

-PERMANENT CUSTODY REQUEST-

The undersigned, after being duly sworn, according to law, says that she *has knowledge of a certain child, to-wit:*

MARY EVELYN HOWELL *age* 7 *years D.O.B.* September 23, 1971

who appears to be (1) a dependent *child, in that* on or about the 18th day of April, 1979 in the City and County of Coshocton, Ohio,

COUNT ONE: she is homeless, destitute and without any means of support, through no fault of her parents,

COUNT TWO: her condition and environment is such as to warrant the state, in the interests of the child, in assuming her guardianship,

"in that said child did not receive proper medical care; that the father is unable to properly care for this child due to his present physical condition and due to his present environment and circumstances; and generally that Mary Evelyn Howell is a severely emotionally damaged child who will require special care and nurturing and a stable environment, which this father is incapable of providing."

in violation of Section 2151.04 (A & C) of the Ohio Revised Code,

Complainant further says:
That said child now resides at c/o Children Services Board, Cosh. Ohio
That the names and addresses of the parents of said child are
William Howell - # 145-559 *residing at* Columbus Correctional Facility 254 W. Spring St., Columbus, Oh
Mary Evelyn Howell (mother) *residing at* deceased 2/16/76
That said child is (is - are) *currently in the care and custody of* (2) her father and Coshocton County Children Services Board by court order granting temporary care and custody on April 12, 1976
And that the following are facts concerning the present circumstances of the said child which the Court should have available for consideration.
Children Services Board are seeking PERMANENT care and custody of Mary Evelyn Howell. If the Coshocton County Children Services is granted the PERMANENT care and custody of the child the father will be permanently divested of all parental rights, privileges, and responsibilities with regard to the child.

Samuel L. Sims, Jr. Prosecuting Attorney
Coshocton County Children Services Board
318 Chestnut Street, Coshocton, Ohio
(Complainant's Address)

Sworn to before me and signed in my presence, this 23rd *day of* April *19* 79

FILED
APR 23 '79
RICHARD I. EVANS, JUDGE
COSHOCTON COUNTY, OHIO

Richard I. Evans
Judge

By Matilda J. Porteus, *Deputy Clerk*

1. "Delinquent," "Neglected," "Dependent," "Crippled," "Unruly"
2. If child is in care or custody of one or both parents, the complaint should so state. Otherwise, the name or names and addresses of the person or persons having custody should be given. The existence or non-existence of a legal guardian also should be stated here along with any needed names and addresses.
(3) Wherefore, complainant prays for the permanent care and custody of said child(ren).

IN THE COURT OF COMMON PLEAS

JUVENILE DIVISION

COSHOCTON COUNTY, OHIO

IN THE MATTER OF:)
)
MARY EVELYN HOWELL.) CASE NO. 5957

MEMORANDUM OPINION

The case of In re Hunt, 46 O. S. (2) 378, considered the effect of Section 2151.04 (c), and the provisions of Section 2151.27 and Juvenile Rule 10 (B) (1). The court found that each of these require that the complaint shall:

> "State in ordinary and concise language the essential facts which bring the proceeding within the jurisdiction of the court...."

The Supreme Court found no constitutional infirmity in either of these sections, and this court likewise does not find Section 2151.04 (c) unconstitutional.

The complaint in the instant case does contain a statement which meets the standard set by the Supreme Court in Hunt, and the motion to strike is overruled.

HOLLAND M. GARY, Judge

IN THE COURT OF COMMON PLEAS

JUVENILE DIVISION

COSHOCTON COUNTY, OHIO

In the Matter Of	:	Case No. 5957
MARY EVELYN HOWELL	:	MOTION TO STRIKE

Respondent William Howell, by and through his attorney, respectfully moves this Court for an order striking from the Complaint, filed in this matter on April 23, 1979, Count Two in its entirety for the reason that the language of §2151.04 (c) is vague and overly broad and as a consequence is violative of Respondent's rights of substantive due process of law under the Ohio and United States Constitution as more fully set forth in Respondent's Memorandum in Support which follows.

Respectfully submitted,

Edward Emmett O'Farrell

Edward Emmett O'Farrell
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MEMORANDUM IN SUPPORT

Respondent urges this Court to strike Count Two of the Complaint in its entirety for the reason that the language of §2151.04 (c) of the Ohio Revised Code is so overly broad, vague and nebulous that to deprive Respondent of the permanent custody, care and control of his child based on this portion of Ohio's dependency statute would be a gross violation of Respondent's property interest in his child and a denial of his rights of due process under the constitutions of the United States and the State of Ohio.

FILED
JUN 13 '79 39
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The constitutionality of Ohio's dependency statute (§2151.04, Ohio Revised Code) has yet to be determined by Ohio's highest court. This is a case of first impression in Ohio.

Any analysis of Section 2151.04 (c), Ohio Revised Code (hereinafter the statute) must necessarily begin with an analysis of the parental rights involved. Respondent believes the crucial consideration must be framed as follows: Is a parent's right to raise his child(ren), and not to be separated from that child(ren) a fundamental, constitutionally protected right? This question has been considered by the United States Supreme Court on several occasions.

In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court held that the right to raise one's family is an essential right of a parent (262 U.S. at p.399), terming this right a "liberty" interest in a 14th amendment context. The Supreme Court's ruling in Meyer, supra, has been reaffirmed subsequently in Pierce v. Society of Sisters, 268 U.S. 510 (1925) and in Prince v. Massachussets, 321 U.S. 158 (1944).

Perhaps the most persuasive, and recent, treatment of this "liberty" interest of parents by the U.S. Supreme Court has come in the case of Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley the Court (in granting the father of an illegitimate child the right to custody) said:

> (T)he rights to conceive and to raise one's children have been deemed essential... basic civil rights of man. (405 U.S. at p. 351)
>
> (T)he interest of a parent in the companionship, care, custody and management of his or her child comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements (405 U.S. at p. 351).

Thus, it is unarguable that the U.S. Supreme Court has determined that parental rights of custody, care, love and affection of their children to be fundamental, liberty interests protected by the safeguards of the United States Constitution.

Since the Ohio Supreme Court has never ruled on the constitutionality of Ohio's dependency statute, it is necessary to discuss other jurisdictions' treatment of similarly worded statutes and argue analogously to §2151.04 (c), Ohio Revised Code. Most of the Courts which have considered the constitutionality, or lack thereof, of the dependency statutes of other jurisctions, have considered the parent's right to raise his child to be a "fundamental right" and have applied the "strict scrutiny" analysis, the highest constitutional standard. See Alsager v. Dist. Ct. of Polk Cty.,406 F. Supp. 10 (S.D. Iowa, 1975) aff'd on procedural grounds 545 F.2d 1137 (8th Cir., 1976); Roe v. Conn., 417 F. Supp. 709 (M.D. Ala., 1976). Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir., 1977); Davis v. Page, 442 F. Supp. 258 (S.D. Florida, 1977); In re Carmaletta B., 579 P-2d 514 (California, 1978); In re B.G., 11 Cal. 3d 679, 114 Cal. Rptr. 444, 523 P.2d 244 (1974); Bowers v. State, 283 Md 115, 389 A 2d 341 (Supreme Court of Maryland, 1978); State v. McMaster, 259 Ore. 291, 486 P.2d 567 (1971). It would seem apparent, then, in light of this overwhelming authority, that the strict scrutiny test and standard must be applied by this Court in considering whether or not Section 2151.04 (c), Ohio Revised Code passes constitutional muster.

Respondents argument relative to the constitutionality of Ohio's dependency statute is basically a treatment of the concepts of "vagueness" as a denial of "due process" and "substantive due process rights" as provided for in the U.S. and Ohio Constitutions.

I. "VAGUENESS" AS A DENIAL OF RESPONDENT'S DUE PROCESS RIGHTS

The parental rights involved in a dependency proceeding have been determined to be "fundamental", thus requiring that the state's infringement upon these rights be accorded a "strict scrutiny" analysis (See Alsager, and other cases cited supra.) In the context of "void for vagueness", this means that the standards announced by the U.S. Supreme Court in

with the vagueness of neglect and dependency statutes of other states. See Alsager, supra; Roe, supra; In re D.L.H., 198 Neb. 444, 253 N W.2d 283 (1977); Matter of Keyes, 574 P.2d 1026 (Okla., 1978); Bowers v. State, supra; In re William L., 477 Pa. 322, 383 A. 2d 1228 (1978), cert. denied 58 L.E. 2d 693; In Interest of Hockmuth, 25 N.W. 2d 484 (Iowa, 1977); People v. Schoas, 15 Ill. App. 3d 964, 305 N.E. 2d 560 (1973), app. denied, S.Ct. of Ill. (unreported), app. dismissed, 417 U.S. 963.

The Alsager, Court, supra, in applying the standards set forth in Grayned, supra, said at page 17:

> 1) The statute (Iowa) as interpreted by a man of average intelligence, must give notice as to what is prohibited, so that the parents may conform their conduct to the law.
>
> 2) The statute must not be an improper delegation of policy making power so as to allow selective or arbitrary enforcement (Emphasis added).
>
> 3) The statutes' vagueness should not give rise to uncertainty, which would have a chilling effect on the parents conduct...

Courts addressing this "notice" requirement have split in their decisions in a rather consistent manner. State statutes which do not have a "built in" period between adjudication and disposition, during which period parents have the opportunity to modify their conduct according to specific orders of the trial court have been held to be unconstitutionally vague. (See Alsager, supra, Roe, supra). Those state statutes which give the parent an opportunity to modify his or her conduct to a court - ordered standard prior to disposition, have been upheld as constitutional.

It is interesting to note that the Iowa statute, struck down in Alsager, supra, as being both vague and a denial of substantive due process was subsequently upheld in both In Interest of Hockmuth, supra and Crooks v. McNeely, 262 N.W. 2d, 786 (1978). In the latter two cases, the Iowa Supreme Court held that since the parents were given an opportunity to meet certain court ordered standards, the statute was constitutional as applied. The parents in Alsager, supra (see note 12, p.20)

were not given this opportunity.

Secondarily, in arguing that Ohio's statute is unconstitutionally vague and overly-broad, Respondent submits that the statute in Ohio, is arbitrarily enforced. The vagueness of Ohio's statute breeds inconsistent, and, thus, unconstitutional application. This statute, in effect, allows arbitrary and selective enforcement of Ohio's dependency statute by low level county standards of what "conditions warrant the state in assuming guardinanship".

A classic example of a vague dependency statute capable of selective enforcement is found in Roe v. Conn, supra, in which the trial judge made a finding dependency when the only facts made known to him were that the child and mother (white) were both living with a black man.

That the lack of any ascertainable standards (vis a vis dependency) could lead to arbitrary enforcement of Ohio's dependency statute becomes even more apparent, especially when the statute does not require injury to the child (i.e. termination need only be in the "best interest" of the child.) The lack of any ascertainable standards necessarily makes any decision by a judge (at either the trial or appellate level) both subjective and discretionary. Furthermore, appellate review would seem unlikely to narrow the discretion granted to the trial court since the appellate judges are unlikely and unwilling to substitute their subjective judgment for that of the trial court's since the trial court had face to face contact with all parties involved, etc.

The institution in Ohio, then, of a procedure, in the dependency context, in which the trial court must set specific standards which the parents of children could attempt to meet and fulfill would serve two purposes. First of all, it would give parents notice as to what sort of conduct the law expects of them as it relates to their children. Secondly, the standards set by the trial court would give an appellate, or review, body objectively ascertainable standards upon which the higher court could evaluate the decision of the trial court to sever the parent - child relationship.

II. SECTION 2151.04 (c), OHIO REVISED Code DENIES SUBSTANTIVE DUE PROCESS TO PARENTS OF ALLEGED DEPENDENT CHILDREN

Respondent in his argument, supra, has submitted that a fundamental right is at issue in a dependency proceeding when the possibility of permanent divestiture of parental rights is a possible consequence of the proceedings. Thus, a "strict scrutiny" analysis is appropriate. The primary concern, then, of the court, must be to determine what is the appropriate test under these circumstances.

The appropriate standard or test is, according to the overwhelming weight of authority (See Alsager, supra, at p. 21; Roe, supra; In Re Carmaletta B., supra; State v. McMaster, supra.) that where certain fundamental rights are involved, the courts have held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. See Roe v. Wade, 410 U.S. 113, at p. 155 (1973).

The key to this Court's consideration then is whether or not Section 2151.04 (c) is drawn narrowly enough so that the state's infringement occurs only when it has a compelling interest at stake.

The obvious question, then, is what constitutes a "compelling state interest" in Ohio's dependency context. It is agreed that a finding of a submarginal home or that a child is culturally deprived is not sufficient to give rise to a compelling state interest in divestiture from parents of their children. (See In Re William L., 383 A. 2d at p. 1233 (S.Ct of Pa., 1978), Cert. denied 58 L.E. 2d 693. It appears that the state's interest, in dependency proceedings, is only compelling upon a showing of injury to the child or a high probability of future injury. (See Alsager, supra; Roe, supra; In Re William L., supra; State v. McMaster, supra; In Re B.G., supra; see also In Re Terry D., 148 Cal. Rptr. 221, 83 Cal. App 3d 890.

It seems logical, then, in light of this standard that the harm suffered by the child must be irremedial in nature in order to justify termination as opposed to temporary custody and ultimate return to the parents.

The final consideration in terms of analyzing a "compelling state interest" in this context is to address the nature of the injury to the child. This is generally a matter of degree. The highest standard required was formulated in Alsager, supra at p. 21. This standard was verbalized as "a high and substantial degree of harm". This standard is particularly applicable where the child, as in this case, has been placed in the temporary custody of the state and thus removed from the threat of immediate danger.

California would aliow removal of the child from his parents only if its return to the parents would be "detrimental" to the child. (This interpretation was upheld in In Re B.G., supra.

Pennsylvania requires that removal occur only to avoid irreparable injury to the child (See In Re William L., supra).

Oregon requires a clear showing of injury prior to termination of the parent child relationship (See State v. McMasters, supra). It should be noted that all of these state standards have passed constitutional muster in treatment by the particular State's highest judicial body. In Alsager, supra, the minimal standard was announced and applied: the harm to the child that would be caused by returning him to his parents must be greater than the harm caused to him (child) by termination in order for their to be a compelling state interest.

Consequently, Ohio cannot terminate a parent child relationship unless it manifests and clearly demonstrates a compelling state interest in said termination. Ohio cannot, and has not in the case of this statute, possess a compelling interest unless there is evidence of present or future injury to the child and the wording of the statute states such. Ohio's statute, more particularly Section 2151.04 (c), Ohio Revised Code sweeps too broadly and is vague as it relates to a present

or future injury to the child and allows termination of the parent-child relationship absent the showing of a compelling state interest. This denies substantive due process to Respondent William Howell and is unconstitutional.

In conclusion, Respondent urges this court to hold the Ohio dependency statute unconstitutional for vagueness and for denying, in its application to parents of children alleged to be dependent thereunder, substantive due process under the U.S. and Ohio Constitutions. Section 2151.04 (c) allows trial courts, in Ohio, to terminate parental rights if it is found that the child's environment is not in his or her "best interests (See, In Re Douglas, 1100 2d 340, 164 NE 2d 475 (1959)). This analysis is necessarily subjective, providing no standards in terms of appellate review and thus, sowing the seeds of inconsistent adjudication in similiar fact situations.

Respondent argues that it is nearly impossible to find a statute drawn in any broader terms than Section 2151.04 (c), Ohio Revised Code. This subsection requires no finding of any sort of injury as a pre-condition to permanent divestiture of a child from his parent. This fatal deficiency in Ohio's dependency statute suggest that there are many instances in Ohio in which no compelling state interest has been shown, yet termination of the parent child relationship has been ordered and will continue to be ordered absent a substantive change in the statute. This is a clear violation of parents' due process rights.

Respondent urges the Court to strike down Section 2151.04 (c), Ohio Revised Code as unconstitutional and to disallow it to be used by the State in prosecuting this action.

Respectfully submitted,

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